The Real Estate Roundtable

November 10, 2020

Federal Energy Regulatory Commission
Secretary of the Commission
888 First Street, NE
Washington, DC 20426

Re: **FERC Docket No. AD20-14-000**
173 FERC ¶ 61,062
Carbon Pricing in Organized Wholesale Electricity Markets

The Real Estate Roundtable (www.rer.org) appreciates this opportunity to comment on FERC's proposed policy that encourages wholesale electricity markets to incorporate state-established carbon pricing rules. On behalf of the owners, managers, and financiers of the nation's top real estate companies,[1] we offer these comments from our dual perspectives as: (1) stakeholders regulated by laws setting mandates on our building assets to measure and reduce carbon emissions and energy consumption; and (2) consumers of electricity that run our buildings for the optimum safety, comfort, and productivity of our residents, business tenants, and visitors.

Ambitious steps taken by federal, state, and local regulators since the turn of the century have reshaped America's power sector. "Roughly half of the growth in U.S. renewable energy generation since the beginning of the 2000s can be attributed to state renewable energy requirements."[2] Over 20 states have binding "carve-outs" to diversify their resource mix, requiring offshore wind, rooftop solar, or other specified technologies to meet a certain percentage of overall renewable requirements.[3] FERC itself "has ordered grid operators to allow emerging resources," such as battery storage and demand response programs, "to compete with incumbent power providers on a level playing field."[4] Hitting closer to home for Roundtable members are the 34 state and local laws that require commercial buildings to measure and benchmark their energy use, conduct energy audits, and retrocommission systems.[5] A number of jurisdictions are taking these laws to the next level, requiring buildings to undergo retrofits or meet specific targets to lower their energy consumption and/or meet GHG emissions limits.[6]

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[1] The Real Estate Roundtable brings together leaders of the nation's top publicly-held and privately-owned real estate ownership, development, lending and management firms with the leaders of major national real estate trade associations to jointly address key national policy issues relating to real estate and the overall economy. Collectively, Roundtable members' portfolios contain over 12 billion square feet of office, retail and industrial properties valued at more than $3 trillion; over 2 million apartment units; and in excess of 3 million hotel rooms.

[2] National Conference of State Legislatures, *State Renewable Portfolio Standards and Goals* (April 17, 2020).

[3] Clean Energy States Alliance, *Credit Multipliers in Renewable Portfolio Standards* (July 2018).

[4] Matthew R. Christiansen and Joshua Macey, *Long Live the Federal Power Act's Bright Line*, abstract at p. 2 (to be published at 134 Harv. L. Rev. (forthcoming 2021)).

[5] Institute for Market Transformation (IMT), *U.S. Building Policy Comparison Matrix* (updated Sept. 2020).

[6] IMT, *U.S. City Policies: Building Benchmarking, Transparency, and Beyond* (updated May 2020).

These laws – and environmental demands from real estate investors, tenants, and other audiences – have prompted newfound awareness by commercial building owners to examine their "energy supply chain." Roundtable members now routinely assess where the electricity they purchase derives ***from***. Indeed, the U.S. commercial sector consumed 104% more Btus of energy from renewable sources in the decade span from 2009-2019.[7] As a result, a growing priority for our industry is to develop and access uniform protocols, methods, and data – across state and local boundaries – to measure, quantify, and price GHG emissions. Within FERC's sphere of regulating wholesale electricity markets, we believe the Commission has a vital role to help facilitate a harmonious nationwide system of standards relating to carbon measurement and pricing.

(A) To the maximum extent of its authority in reviewing wholesale market rules, FERC should foster national uniformity that avoids a patchwork of different state and local carbon protocols.

If 50 states and scores of local jurisdictions are left to their own devices to craft their own approaches to measure and price carbon, havoc would ensue upon grid operators and other wholesale market actors – not to mention upon the utilities, real estate, transportation, industrial, and other economic sectors with goals to reduce their emissions either by mandates or voluntary commitments. The Roundtable acknowledges that FERC is not "an environmental regulator" and its proposed policy here provides no license to "set a carbon price."[8] With these caveats in mind, we strongly encourage the Commission to appropriately leverage its authorities to assess whether common measurement and quantification standards support various states' carbon pricing regimes.

To borrow a phrase of the Environmental Protection Agency (EPA) regarding its ENERGY STAR program, "You can't manage – ***or price*** – what you don't measure."[9] Certainly, only Congress has the authority to permit a national price on carbon and create a federally regulated, competitive GHG market – but law passed by both chambers of Congress on this front is not imminent. In the meantime, The Roundtable is mindful that "the most critical issues" facing our modern electricity sector "lie at the confluence of State and Federal jurisdiction."[10] We thus urge the Commission to consider wholesale market policies in a manner favoring consistency over chaos in state and local carbon measurement and pricing programs.

For example, one way in which FERC can advance greater national uniformity in carbon measurement is by promoting state and regional reliance on the latest available data provided by EPA's Emissions and Generation Resource Integrated Database ("eGRID"). This is the "pre-eminent source of air emissions data for the electric power sector."[11] It integrates EPA's own data on emissions with national data on electric generation provided by power plants to the U.S. Energy Information Administration (EIA).[12] FERC's review of carbon pricing regimes (in the context of wholesale market rules) should encourage states and localities to routinely rely upon the federally managed eGRID to measure emissions from their electricity grids, and develop metrics for their own GHG registries and renewable portfolio standards. Uniform reliance on standard data (like eGRID) can help address "leakage" problems highlighted by FERC in its proposal here, where emissions ***reductions*** in a state with strict climate laws might result in emissions ***increases*** in another state with looser regulations. If states use the same data and carbon measurement tools – at FERC's urging – the groundwork is laid for more consistent cross-border policies within multistate regional markets. Indeed, the Commission notes that 13 states "have

[7] U.S. Energy Information Administration, Monthly Energy Review, Table 10.2a (October 2020).
[8] Remarks of Commissioner and Former Chairman Neil Chatterjee on FERC Proposed Policy Statement on State-Determined Carbon Pricing in Wholesale Markets (Oct. 15, 2020).
[9] See https://www.energystar.gov/buildings/facility-owners-and-managers/existing-buildings/use-portfolio-manager.
[10] Christiansen and Macey, *supra* n. 4, at pp. 5-6.
[11] See https://www.epa.gov/egrid/egrid-questions-and-answers.
[12] EIA "collects detailed electric power data – monthly and annually – on electricity generation, fuel consumption, fossil fuel stocks, and receipts at the power plant and prime mover level" through Form EIA-923.

adopted clean energy or renewable portfolio standards," 19 states and D.C. "have adopted economy-wide decarbonization goals or targets," and 11 states "impose some version of carbon pricing."[13] FERC is uniquely postured to bring some standardization to this policy patchwork by offering guidance for harmonious carbon quantification methods and data sources.

Directly impacting the U.S. real estate sector is the trend of state and local mandates that establish energy- and climate-related "performance standards" on buildings.[14] Illustrative of this trend is Local Law 97 ("LL 97"), passed in 2019 by the New York City Council.[15] LL 97 generally requires buildings larger than 25,000 square feet to meet GHG emissions limits starting in 2024 – with more stringent limits to take effect for the second compliance period starting in 2030. The law establishes different "emissions intensity" targets – that is, the amount of carbon emitted per square foot – depending on a building's type (*e.g.*, office, industrial, hotels, residential, etc.).[16] Moreover, because different forms of energy when combusted release varying amounts of carbon, LL 97 initially codifies "greenhouse gas coefficient factors" that convert a building's energy use to carbon emitted based on the building's fuel source.[17] For present purposes, it is key that the city's ***codified*** GHG conversion factors preliminarily align with EPA's eGRID on power sector emissions.[18] Furthermore, EPA's ENERGY STAR program uses eGRID data to quantify a building's unique carbon footprint[19] through the agency's industry-standard "Portfolio Manager" benchmarking tool, used by 24 billion square feet of U.S. commercial floorspace in 2019 alone to measure energy use.[20]

Imagine if a multitude of different states and cities used dissimilar tools – ***not*** EPA's Portfolio Manager – to measure the carbon footprint of a real estate asset. Likewise, imagine if myriad cities and states developed their own "greenhouse gas coefficient factors" – using data that is ***not*** eGRID. The compliance burden on real estate and other regulated entities, as they attempt to navigate varying emissions measurements that shift from state … to county … to city, would be unjustifiably onerous. Indeed, building owners' compliance with LL 97 alone is enough of a monumental task. Yet, the electricity coefficient codified in the local law itself for mandatory building emissions limits has its own shortcomings relative to carbon targets coming out of Albany. The ***city's*** electricity coefficient reflects eGRID power generation data from ***2016***. It does not look forward to the ambitious target set thereafter by the ***state*** in ***2019***, for zero-emission electricity by 2040.[21] The respective city and state goals could be at odds with each other if each jurisdiction goes down separate paths to develop their own coefficients to convert electricity to carbon, exacerbated by their possible reliance on dissimilar data (or, on varying "vintages" of eGRID data). Different carbon targets, based on different emissions data, forming different fuel conversion metrics, would render stakeholders' compliance virtually impossible – undermining policy makers' climate goals and destabilizing their regulatory regimes.

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[13] *Notice of Proposed Policy Statement*, 173 FERC ¶ 61,062, at pp. 2-3.
[14] See Steve Nadel and Adam Hinge, American Council for an Energy-Efficient Economy, *Mandatory Building Performance Standards: A Key Policy for Achieving Climate Goals* (June 2020) (compendium of international, state, and city laws and pending efforts to establish energy reduction or carbon emissions limits on commercial and residential buildings).
[15] Available at https://www1.nyc.gov/assets/buildings/local_laws/ll97of2019.pdf.
[16] NYC Code, Article 320, § 28-320.3.1 (annual building emissions limits for 2024-2029); § 28-320.3.2 (2030-2034 limits).
[17] *Id.*, § 28-320.3.1.1. LL 97 codifies GHG conversion coefficients only for the first compliance period (2024-2029), with rules to establish fuel conversion factors for the 2030-2034 compliance period to be developed by January 1, 2023.
[18] Urban Green, *NYC Building Emissions Law: Frequently Asked Questions*, FAQ #14.
[19] See EPA, *Portfolio Manager Technical Reference: Greenhouse Gas Emissions* (updated Oct. 2020), at p. 3 ("Portfolio Manager applies regional GHG factors to compute the GHGs associated with electric consumption … based on measured power plant data from utility owners and operators. For the U.S., these regional factors are determined using EPA's Emissions & Generation Resource Integrated Database (eGRID)).")
[20] See EPA ENERGY STAR, *Facts and Stats*.
[21] New York State's *Climate Leadership and Community Protection Act*, passed in 2019, sets "nation-leading climate targets" including 100% zero-carbon electricity by 2040. See https://climate.ny.gov/.

The Roundtable believes FERC can help. It can check the problem of hodge-podge regulations from taking root nationwide. The Commission's federal-level review of wholesale markets allows it to "herd the cats" and drive cities and states to get on the same page with regard to common GHG measurement practices and reliance on the same available data sources.

While the Commission itself cannot set a carbon price or develop techniques to measure GHG emissions, it can exercise its delegated powers in ways that can help create homogeneous national standards. "The integration of carbon prices into wholesale markets provides FERC an opportunity to … complement, not replace, state policies while also removing barriers to competitive markets" – such as through the "***harmonization*** of state environmental policies."[22] Accordingly, The Roundtable respectfully advises FERC to endorse federal data, methods, and other nationwide tools to cultivate a regulatory environment for consistent carbon pricing and quantification by city and state actors.

(B) Functioning markets for the purchase of carbon offsets and renewable energy certificates (RECs) will depend on consistent rules for emissions pricing and measurement – that FERC should help guide – across state and regional boundaries.

The simple fact is that, on their own, the flood of sub-federal GHG laws has effectively forced the issue – ***throughout the United States*** – that carbon emissions are an economic liability, and carbon reductions are an economic asset. A ***national*** exchange to match emissions transfers between buyers and sellers would likely be the most efficient platform for a competitive market to level-out costs, spreading the financial burden of carbon pollution across all economic sectors and energy end-users. But again, the prospects for Congress to authorize a federal commission to oversee a nationwide market for GHG sales and purchases are remote at best.

Yet, the need for guidance and standardization is acute because states, regions, and municipalities already treat carbon as a tradeable commodity. Their renewable portfolio standards, direct restrictions on emitters, and regional cap-and-trade programs, routinely offer compliance mechanisms allowing purchases of "carbon offsets" and/or Renewable Energy Certificates ("RECs"). Sticking with NYC mandates as a particular example, LL 97 allows building owners to purchase qualified GHG offsets or RECs and deduct amounts of quantified carbon from their assets' emissions limits.[23] The city's regulators have yet to develop rules to implement offset and REC purchases – but the law clearly contemplates the need for these standards.[24]

The Roundtable urges FERC to use its "bully pulpit" here. Plainly, the Commission lacks jurisdiction to regulate GHG offsets or "unbundled RECs" with no direct tether to a bulk electricity purchase.[25] However, the Commission's review of carbon pricing rules, when brought before it by grid operators, envisions greater efficiency and transparency in the wholesale markets. FERC can achieve these precise objectives by lending federal consistency to states' offset and REC programs that treat carbon as a sellable commodity, and not as a state-mandated subsidy of renewable power that may distort the market when paired with carbon pricing.

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[22] Remarks of Prof. Jim Rossi, *Legal Considerations for State-Adopted Carbon Pricing and RTO/ISO Markets*, Docket No. AD20-14, at pp. 6, 8 (Sept. 16, 2020) (emphasis in original).
[23] NYC Code, Article 320, § 28-320.3.6; § 28-320.6.1.
[24] *Id.*, § 28-320.3.6.1 (authorizing rules for deductions based on REC purchases); § 320.3.6.2 (based on offsets).
[25] *Western Systems Power Pool, Inc.*, 139 FERC ¶ 61,061, at p. 18 (2012).

(C) Any revenue raised by carbon pricing rules should be returned as "dividends" to electricity purchasers, and/or channeled as investments to improve and modernize electricity infrastructure.

FERC-regulated wholesale markets are "inextricably linked" to state-regulated retail markets of sales directly from utilities to commercial, residential, and other ratepaying customers; these markets are not "hermetically sealed from each other."[26] We thus commend the Commission for discharging its Federal Power Act obligations here in a manner to ensure that state carbon pricing rules "directly affecting" wholesale rates are "just and reasonable."[27] A fuel-neutral carbon price could lead to increased market efficiency and competition for producers to supply reliable electricity at the lowest costs to meet demands. The Roundtable believes that a properly constructed, market-driven carbon price can yield "improvements in price formation" and "support … the types of long-term price signals that our energy future demands."[28]

Should a state seek to advance carbon emissions goals with features that raise government revenue,[29] FERC should assess whether any "carbon dividend" is returned to wholesale electricity buyers (and to end-consumers) to defray the potentially higher electricity costs they must pay. The Roundtable further advises that carbon pricing revenues should be channeled to fund infrastructure investments aimed to advance grid electrification and increase reliable power supplies from no- or low-emissions sources. Aside from making energy system assets more efficient and resilient, devoting carbon pricing revenues to infrastructure improvements will redound throughout the broader economy. A steady stream of investment capital in grid, transmission, storage, and similar infrastructure will create tens of thousands of well-paying jobs in growing energy employment markets.[30]

(D) Conclusion

The costs and risks associated with carbon generation should be borne proportionately and spread economy-wide. Simply put, those who produce more carbon should pay more, and those who produce less (or offset their production through REC purchases) should pay less – axioms applied in other situations that effectively use competitive market principles to manage environmental problems.[31] Market-driven carbon pricing regimes have major potential to diffuse the financial burdens of climate change so that no economic sector is singled-out with excessive regulatory obligations, and no particular energy technology is subsidized to skew wholesale markets and suppress prices.

However, fair and equitable determinations of who produces "more" or "less" carbon – and who should pay "more" or "less" – necessarily depend upon common practices to quantify GHG emissions, convert fuel sources to carbon, and affix a price per ton of emissions.

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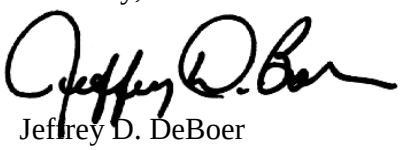
[26] *FERC v. Energy Power Supply Ass'n,* 136 S. Ct. 760, 776 (2016).
[27] 16 U.S.C. § 824d (a). See also *FERC v. EPSA,* following *California ISO Corp. v. FERC,* 372 F.3d 395, 403 (D.C. Cir. 2004)).
[28] Chatterjee Remarks, *supra* n. 8.
[29] FERC considers the term "carbon-pricing" as encompassing both "price-based methods" (such as an explicit fee or charge on GHGs per emitted ton), and "quantity-based methods" (such as through such as auctions within an emissions quota under a cap-and-trade system). *Notice of Proposed Policy Statement* at p. 2, n. 5. Either approach has the potential to raise significant government revenue.
[30] *See generally* National Ass'n of State Energy Officials, *et al.*, 2020 U.S. Energy & Employment Report.
[31] *See, e.g.*, https://www.epa.gov/airmarkets.

FERC's proposed policy provides here an important opportunity for the Commission to "set the table" for state and local policymakers to deploy uniform carbon measurement tools and protocols. As FERC reviews wholesale market rules that incorporate carbon pricing, it should assess whether the state and local laws rely upon standard data and well-recognized quantification methods.

The Real Estate Roundtable appreciates the opportunity to provide these comments. For more information, please contact Duane J. Desiderio, Senior Vice President and Counsel (ddesiderio@rer.org; (202) 639-8400)).

Sincerely,



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